IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 228/2001

Chiddu

Vs

State

With

Criminal Appeal No. 229/2001

Suraj Pal

Vs

State

Date of decision :- 15-7-2005

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 15.7.2005 Initial of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

CRIMINAL APPEAL NO.228 2001 – new number
CRIMINAL APPEAL NO.784 of 1985 – old number

Chiddu S/o Subban
Resident of village Maheshpura
P.S. Bajpur, district Nainital (now Udham Singh Nagar)

…… Appellant

Versus

State of Uttaranchal

…….. Respondent

WITH

CRIMINAL APPEAL NO.229 2001 –new number
CRIMINAL APPEAL NO.791 of 1985 –old number

Suraj Pal S/o Raghubir Singh Kahar
Resident of village Maheshpura
P.S. Bajpur, district Nainital(now Udham Singh Nagar)

…… Appellant

Versus

State of Uttaranchal

……. Respondent

Mr. Dharamveer Sharma and Mr. J.S.Virk learned counsel for the appellants
Sri Rajeev Mohan learned AGA for the State.

Hon'ble J.C.S. Rawat, J.

1. This a criminal appeal against the judgment and order dated 23.03.1985 passed by Sri K.C. Lamba, the then I Additional Sessions Judge Nainital in S.T.No.81 of 1982 State Vs. Chiddu and S.T.No.82 of 1982 State Vs. Surajpal whereby the learned Additional Sessions Judge convicted and sentenced each of the appellant to

undergo seven years rigorous imprisonment under section 376 IPC.

2. The prosecution case, in brief, is that on 1.12.1981 at 02 p.m. the victim (7 years) PW5 and Dalbir Singh (6 years) PW6 when they were on their way to the sugarcane field of their uncle and they reached near the field of Kyali the appellants induced them on the pretext of providing 'Narangi' and took the victim to the side of sugarcane field. Both the appellants committed rape upon the victim. Dalbir Singh (PW6) left the victim al alone there and came to her uncle Om Prakash where he was working in the sugar cane field. Dalbir was asked why he has come alone and the narrated the entire story. They alongwith Raja Ram (PW8) came to the scene of occurrence. On hearing the shrieks of the victim (PW5) Nanhe (PW10) who was passing by the side of the occurrence went inside the field and saw the appellants running away. He also saw the victim lying on the ground and her private parts were bleeding and her clothes were stained with blood. Nanhe (PW10) informed Smt. Shanti Devi (PW4) mother and Stm. Chhoti (PW9) aunt of the victim. Smt. Shanti Devi went to the place of occurrence and saw that from the private parts of the victim blood was oozing and her clothes were stained with blood and she was unconscious. The victim was brought to the house. Then the victim was brought to P.S. Bajpur where Smt. Shanti Devi (PW4) lodged written report (Ex.Ka-5) scribed by Jhabban Singh (PW7) on 01-12-1981 at 04:20 pm. The distance

Between the place of occurrence and police station was 7 kilometers. Head Constable Gopal Dutt (PW-2) on the basis of written report (Ex.Ka5) prepared FIR (Ex.Ka-2) and registered the case in GD vide (Ex.Ka-3).

6. On 01.12.1981 Dr. Smt. P. Kaur, Medical Officer, Government Combined Hospital, Bajpur at 06:30 p.m. examined the victim and prepared injury report (Ex.Ka-1). The doctor found that the bleeding was oozing. The victim was feeling pain in discharge of urine. Ruge linear tear extending upto anus and fresh bleeding present, tags hanging in the vagina, tear in the Labir majora and labia minora measuring 1 X .5 cm and excessive blood present. Vaginal smear was taken and examined for sperms. Red blood bells and few sperms were seen. The injuries were simple caused by friction and duration was under three hours with the result se concluded that rape has been committed upon her.

7- S.I. MP. Juyal (PW-11), Investigating Officer visited the place of occurrence and took in possession sample of blood stained earth (Ext.Ka-3 and 4 from the place of occurrence and prepared recovery memo (Ex.Ka-4) in presence of Noor Mohammad (PW-3). He sent blood-stained clothes (Ext.-1 and 2) of the victim to the Chemical Examiner. He also prepared site plan (Ex.Ka 6). After completing the formalities of investigation charge sheets (Ex.Ka-7 and Ka.-8) were submitted against the appellants.

8- Charge was framed against the appellants u/s 376 IPC to which they pleaded not guilty and claimed to be tried.

9- The prosecution in support of its case examined PW-1 Dr. Smt. P. Kaur who proved injury report (Ex.Ka-1) of the victim, PW-2 Head Constable Gopal Dutt proved FIR (Ex.Ka-2) and GD Entry (Ex.Ka-3), PW-3 Noor Mohammad is the witness of recovery, PW-4 Shanti Devi proved written report (Ex.Ka-5), PW-5 the victim, PW-6 Dalbir Singh, PW-7 Jhabbar Singh, PW-8 Raja Ram, PW-9 Smt. Chhoti and PW-10 Nanhe are the eye witnesses. PW-11 M.P. Juyal is the Investigating Officer.

10- In their statements u/s 313 Cr.P.C. the appellants denied the prosecution case and stated that they have been implicated in this case due to enmity.

11- The learned trial court after appraisal of the evidence on record found the appellants' guilty u/s 376 IPC for committing rape upon the victim and convicted and sentenced the appellants as mentioned above.

12- I have heard the learned counsel for the parties and perused the evidence on record.

13- It was contended on behalf of the appellant Chiddu that there is no evidence against the appellant on the basis of which he can be convicted. It was further contended that the learned trial court has erred in convicting the appellant Chiddu. It was further contended that the victim and her mother Smt. Shanti Devi PW4 had not indicated the name of

sppellant Chuddu during investigating in their statements u/s 161 Cr.P.C. It was contended on behalf of appellant Suraj Pal that he is not disputing the finding recorded by the learned trial court regarding the conviction but the learned counsel only disputed the sentenced passed by the learned trial on the ground that he was juvenile when the offence was committed. The learned A.G.A. refuted the contentions and contended that there are sufficient grounds to convict the appellants and the prosecution has established its case beyond all reasonable doubts against both the appellants. Before examining the respective contentions of the parties it would be appropriate to discuss the evidence in the following three categories:-

1. Whether any incident took place on the date and time of occurrence.
2. Whether any rape was committed on the victim.
3. Whether both the appellants participated in the crime of offence.

14. The prosecution adduced the evidence of the victim PW5 who has stated that she was going along with Dalbir Singh P.W.6 to her uncle in the sugarcane field. When they reached near the field of Khayali Singh she was allured orange and she was taken to the field of sugarcane. Thereafter, the rape was committed upon her and she became unconscious. Thereafter, her aunt Smt. Chhoti P.W.9 came there and brought her to her house. Dalbir Singh P.W.6 has also stated that she was

going with the victim and the victim was allured to take orange. Dalbir Singh P.W.6 left he al alone there and came to her uncle Om Prakash where he was working in the sugarcane field. Dalbir was asked why he has come alone and narred the entire story. Thereafter, they came to the place of occurrence. They saw the appellants running from the place of incident. On the point that the victim was taking to the sugarcane field and she was subjected to rape the evidence is cogent and believable. The defence could not elicit anything during the cross-examination.

15. Now the question for determination is whether the rape was committed upon the victim or not. The learned counsel for the appellant Chiddu has contended that the victim has replied that the appellant has not thrust his organ into her private parts, therefore, the offence has not been established and the appellant has been falsely implicated. The learned AGA refuted the contentions and submitted that the victim has clearly stated that she was subjected to mal-treatment and sexual harassment. The learned AGA also contended that she was a minor girl of 7 years at the time of commission of the offence and she was not aware about all things. As such she could not explain the correct impact of rape. The perusal of the evidence reveals that the victim has categorically stated in her statement that she was subjected to sexual cruelty and she has also

stated that she fell unconscious at the time of the incident and as such she could not explain as to what happened with her. She was 7 years of age being innocent about the fact how the rape was committed. It is also in the evidence that she fell unconscious. Dr. P. Kaur P.W.1 stated that the bleeding was oozing from her private parts. The victim was feeling pain in discharge of urine. Tags were hanging in the vagina, tear in the Labia majora and labia minora measuring 1x.5 cm and excessive blood was present. The doctor took vaginal smear for examination and found that red blood cells and few sperms were seen. The duration of the injury was found three hours. The offence is alleged to have been committed at 2.00 p.m. The factum of incident and the evidence. In these circumstances it is clear that the rape was committed upon the victim. The factum of rape has been sufficiently proved by the prosecution upon the victim.

16. Now, I will take up the case of each appellant separately with regard to the participation in the crime. I will first take up the case of Suraj Pal appellant who was arrested on the next day of the incident from his house. Smt. Shanti Devi P.W.4 has stated that the name of the appellant was informed by Stm. Chhoti P.W.9 to her and the report was lodged on that basis. The evidence of victim clearly reveals that the appellant Suraj pal committed rape upon her. Dalbir Singh P.W.6 has

stated that he saw the appellant Suraj Pal running from the spot. He has further stated in his evidence that when they were on the way the appellant allured to victim to take orange and she was taken inside the sugarcane field. The other witnesses also stated that the victim was lying on the ground with profused bleeding from the private parts and underwear of the victim was sustained with blood. The witnesses have been cross-examined at length but nothing could be elicited to show that hey had any grudge against the appellant Surajpal. There is no enmity, motive or interest against the appellant to falsely implicate him. The underwear of the victim as well as the appellant Suraj Pal were sent for chemical examination and the semen was found in both the underwears. It further corroborates the participation of the appellant Suraj Pal in the commission of the offence. The evidence of Raja Ram P.W.8 further corroborates though he is a hostile witness but he has clearly corroborated the fact that Surajpal participated in the commission of offence. I am completely in agreement with the findings recorded by the trial court against the appellant Suraj Pal that he committed rape upon the victim. No cross-examination has been made to that witness by the defece. The findings of the learned Addl. Session Judge were not challenged by the learned counsel for the appellant and he has not disputed the findings given by the learned Addl. Sessions Judge.

17. The appellant Surajpal has been convicted under Section 376 I.P.C. and sentenced to 7 years R.I. The learned counsel for the appellant has invited my attention that this plea of juvenile was raised before the learned trial court. He was aged about 16 years as stated by the appellant in his statement under Section 313 Cr.P.C. on 20-2-1985.The learned Addl. Session Judge assessed the age of Surajpal as 19 years as endorsed by him in his statement under Section 313 Cr. P.C. It was contended that he was about 16 years of age at the time of the occurrence i.e. on 1-12-1981 and was covered under the definition of child as per U.P. Children Act, 1951 and he should have been set at liberty even if he was held guilty. So far as, the finding of guilty are concerned, it is based on the sound, reasoning and on the credible evidence of the prosecution. I find substantial force in his argument that he should have been set at liberty and conviction should be maintained and sentence should be quashed. The learned counsel for the appellant relied upon the decision of **Jagbir Versus State of U.P. (Allahabad High Court) A.C.C. 1992(2) 656, Jayanendra and another Vs.State of UP 1981 SC (Cri) 809 and Raisul Vs. State of UP AIR 1977 SC 1882.** In the former case the appellant has given his age as 16 years in his statement under section 313 Cr.P.C. The learned Addl. Sessions Judge observed by making an endorsement that the appellant appeared to be 22-23 years on

15.12.1985. Under the latter case the Allahabad High Court held that the appellant was 15 years of age on the date of occurrence and found that it was not fit to sent the appellant to approved school. The appellant filed a certificate from Gram Pradhan regarding his age, which shows the date of birth, as 25.12.1968 and the learned trial court did not find it conclusive proof of the fact. However, in view of the above discussion if the age of the appellant was 19 years as on the date of recording the statement u/s 313Cr.P.C. and the incident took place on 1.12.1981 and the statement u/s 313 Cr.P.C. was recorded on 20.2.1995 and the learned trial court assessed the age about 19 years even then he is juvenile on the date of occurrence. This fact corroborates from the certificate filed by the appellant. Therefore, having regard to the entire facts of the case and the law on this point as indicated above the appellant Suraj Pal was 16 years at the time of occurrence i.e. on 1-12-1981. Today, at the time of hearing of appeal his age is 34 years. So there can be no question to send him to approved school under Section 29 of Children Act.

18. Section 20 provides for special provision in respect of pending cases. It provides that notwithstanding anything containing in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act came into force in that area shall be continued in that court as if the Act had not been passed and if

the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Act as if tit had been satisfied on inquiry under this Act that a juvenile has committed the offence. Section 16 of the Juvenile Justice (Care & Protection of Children) Act 2000 provides that no juvenile shall be sentenced to death or life imprisonment, or committed to prison in default of payment of fine or in default of furnishing security. A juvenile, under the provisions of the Act, can be referred to the Juvenile Board for such orders to be passed by the Board as it things fit in terms of Section 15 of the Act. The Juvenile Justice (Care & Protection of Children) Act 2000 came into force on 1.4.2001. When the appeal filed by the appellant was pending before this Court, the Act became applicable. **(See Upendra Kumar Vs. State of Bihar 2005 SCC(Cri) 778).**

19. Therefore, in view of the above case law the conviction can be maintained against appellant Surajpal under Section 376 I.P.C. but the sentence for 7 years R.I. is liable to be quashed.

20. No it take up the case of appellant Chiddu. He is nominated in the F.I.R. When the statement of Smt. Shanti Devi P.W.4 was recorded before

the trial court a report was lodged by P.W.4 Shanti Devi in which he has named Suraj Pal and Chiddu as an accused. Smt. Shanti Devi stated before the Investigation Officer in her statement under Section 161 Cr. P.C. that she nominated Chiddu at the behast of Jhabbar Singh P.W.7. When this contradiction was put to this witness she simply stated that she did not give this statement to the I.O. Thereafter, the Investigation was transferred to another Investigating Officer who started investigation. Her statement was recorded and she stated that she has already given her statement to the first Investigating Officer. Her statement recorded by the first Investigating Officer may be taken into account because the same statement is true and correct. The evidence clearly reveals that the name of Chiddu was introduced at the time of reporting the F.I.R at the behast of Jhabbar Singh P.W.7. P.W. 4 Smt. Shanti Devi is not the eyewitness. It is also relevant that Jhabbar Singh P.W.7 has stated in his evidence that when the chargesheet against Chiddu was not submitted then he went to the police station. He sat on the hunger stricken and he remained on the hunger strike for some days. It is also admitted by P.W.7 Jhabbar Singh in his cross-examination that litigation between the parties was pending. He has in his cross-examination admitted that he reported the matter against Chiddu that he entered into his house and a FIR was lodged. He further stated in his

evidence that Chiddu's father Shugan took the bulls to the "Khor" and the case was instituted It is also in his evidence that he belongs to a political party to which the appellant Chiddu does not belong. Chiddu belongs to other political party. Both have a rivalry amongst them. As such the enmity was between the parties. The evidence of the parties has to be examined very carefully. The victim PW5 has stated that both the persons committed rape upon her. The statement of the victim was recorded under Section 161 Cr.P.C. in which she has not named the appellant Chiddu. When she was put to these omissions as to how she has not named Chiddu she stated that she does not know how the investigating Officer did not write the name of Chiddu. P.W.6 Dalbir Singh stated that he saw both the persons running from the field immediately after the occurrence but he has not stated the name of the appellant Chiddu. He gave the statement before the police under Section 161 Cr.P.C. PW 8 Raja Ram stated that he saw Suraj Pal running from the field of sugarcane though he was declared hostile by the prosecution. Whereas the evidence of Nanhe PW10 is concerned his statement under section 161 Cr.P.C. was recorded after three months. It is also in the evidence that the victim is his cousin. There is no explanation as to why his statement was recorded after a lapse of three months. PW 11 I.O. has stated that he recorded the statement of Smt. Shanti Devi and she stated to him that the

participation of the appellant in the commission of the offence was stated by Jhabbar Singh to her. The other contradictions and omissions with regard to participation of Chiddu were put to the I.O. and he proved the statements. The above discussion shows that at the initial stage the name of the appellant Chiddu was not stated during the statements under Section 161 Cr.P.C. and the name of Chiddu was introduced later on and it is and after thought story.

21.In view of the above discussions I am of the view that the appellant Chiddu is entitled to be acquitted.

22. The appeal preferred by appellant Chiddu is allowed and the impugned conviction and sentence passed by the learned trial court against appellant Chiddu are set aside. The appellant Chiddu is acquitted of the offence punishable under section 376 IPC.

23. The appeal of Suraj Pal is partly allowed. The conviction against Suraj Pal is maintained but the sentence passed by the trial court against him is quashed.

(J.C.S.Rawat J.)

July-15 ,2005
MPS